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IN THE

Supreme Court of the United States

October Term 1968

NUMBER_____

AMBRY D. ALLEN, JR.,

Petitioner,

—v.—

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Ambry D. Allen, Jr. petitions this Court for a writ of certiorari to review the judgment and opinion of the Court of Appeals of Georgia entered in the Case of AMBRY D. ALLEN, JR. v. THE STATE OF GEORGIA on the 3rd day of September, 1968.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals of Georgia are as yet unreported but are appended hereto, (Appendix) and unofficially reported in 118 Ga.

App. 354, (Advance Sheet of November 7th 1968); 163 SE2d 839 (Advance Sheet of November 28th 1968).

JURISDICTION

The judgment of the Court of Appeals of Georgia was dated and entered on September 3rd 1968. A rehearing in said judgment was denied by the Court of Appeals of Georgia on September 18th 1968. Petition For Writ of Certiorari to the Court of Appeals of Georgia was filed in the Supreme Court of Georgia and was denied on November 7th 1968, Motion For Reconsideration being denied on November 21st 1968, (Appendix). The jurisdiction of this Court is invoked under U.S.C. 1257 (3) since a right, privilege, and immunity is specially claimed under the Constitution of the United States of America.

QUESTION PRESENTED FOR REVIEW

The question presented is whether when the prosecuting Court Official promises petitioner and petitioner's attorney, prior to plea of Guilt, (a) that petitioner would be transferred within fifteen (15) days after the plea from federal custody to state custody through arrangements previously made with the late Honorable Robert F. Kennedy, the then United States Attorney General, and (b) promises that petitioner shall receive a total five year (5) jail sentence from the sentence in Court; the petitioner entering his plea of Guilt under these inducements and promises, the sentencing Judge thereafter making it known in open Court that the sentence would be a total of seven (7) years in jail; the prosecuting court official then assuring and guaranteeing petitioner that two of these seven (7) years would be remitted, and petitioner not withdrawing his plea of

guilt due to these assurances and promises and petitioner receiving a seven year (7) jail sentence; constitutes a free and voluntary confession of guilt by plea without violation of due process of law, none of the assurances and promises being fulfilled.

CONSTITUTIONAL PROVISIONS AND GEORGIA LAWS INVOLVED

The Fourteenth Amendment to the Constitution of the United States of America provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

The 1933 Code of Georgia as amended, Section 38–411 provides:

> "To make a confession admissible, it must have been made voluntarily, without being induced by another, by the slightest hope of benefit or remotest fear of injury."

The Constitution of the State of Georgia Article I, Section I, Paragraph III, 1933 Code of Georgia as amended Section 2–103 provides:

> "No person shall be deprived of life, liberty, or property, except by due process of law."

STATEMENT OF CASE

Petitioner, Ambry D. Allen, Jr., was indicted by the Grand Jury of Fulton County, Georgia on February 22nd 1963, Honorable Lester G. Maddox being the Foreman thereof, and charged in several indictments alleging Larceny of Automobiles, among these being Indictment No. 83334 which alleged two previous felony convictions in 1951, there being eight separate indictments returned and numerous counts involved in this

case. Petitioner during 1964, while serving a federal sentence, had assurances and promises from the late William T. Boyd, then Solicitor General of the Atlanta Judicial Circuit, that if petitioner would plead Guilty in Fulton County, Ga. to all State charges, that petitioner would be transferred within fifteen (15) days after the plea from federal custody into state custody, and petitioner would receive a total sentence of five (5) years on all the pending Fulton County charges. On August 4th 1964, Habeas Corpus Ad Prosequendum was initiated by said Solicitor General for the purpose of having petitioner produced from the United States Penitentiary, Atlanta, Georgia to the Fulton Superior Court at 9:30 o'clock a.m. on August 5th 1964, said Writ of Habeas Corpus being issued. (R10-13) On August 5th 1964, the said Solicitor General made the same assurances and promises to petitioner and petitioner's attorney explaining that prior arrangements had been made through the late Honorable Robert F. Kennedy, the then United States Attorney General to have petitioner transferred, within fifteen (15) days after the plea, from federal custody into state custody. The attorney employed by petitioner for the plea only, spent about forty minutes with petitioner before and during the plea. Petitioner, on August 5th 1964, withdrew Guilty pleas previously entered when represented by Attorney George G. Finch, and based on the assurances and promises from the said Solicitor General. Petitioner, while represented by Attorney Frank S. French, entered pleas of guilty in Fulton Superior Court to all eight pending indictments, including Indictment No. 83334, (R6-8) the indictment to which petitioner filed his Motion To Withdraw Plea and To Vacate And Set Aside Judgment of Conviction and Sentence. The late

Honorable Stonewall Dyer, Judge, Fulton Superior Court, A.J.C., declined to follow the recommendation of the Solicitor General that petitioner be sentenced to serve only a total of five years, said Judge announcing in open court that petitioner, in addition to a five (5) year sentence, would receive an additional five year sentence to follow, to serve two of those years and the balance suspended. The said Solicitor General at this point assured and promised petitioner, petitioner's attorney and petitioner's brother that if petitioner went through with the plea, that the additional time over and above five years would be remitted and taken care of by him. After the additional two years came into the picture, according to the testimony of Attorney Frank S. French (R94-96) ". . . Mr. Boyd did say in my presence, did say, don't worry about that extra two years." Q. "Who did he say that to?" A. "To A. D. Allen, he says, I can get that knocked off later, but I can't do it right now." Q. "What did A. D. Allen say?" A. "He said, under those circumstances he would enter a plea, take seven years, five years plus two years on the other indictment to follow, plus three years of the remainder of that five years to be suspended . . ." Q. "Did you have any conversation with Mr. Boyd about how he planned to take care of those two years?" A. "No; no, no, I didn't." Q. "But the assurance was made to A. D. Allen, Jr.?" A. "Yes, sir."

After the additional two years came into the picture, according to the testimony of petitioner, (R140-141) Q. "Did Frank French have anything to say to you before sentence was pronounced?" A. "Judge Dyer didn't say anything to me, Mr. Boyd asked the questions. Mr. French, he walked back over and told me,

said you're going to get a seven year sentence. I said "Bill Boyd told me only five year sentence. So Mr. French stepped back, I looked at my brother and I shook my head at him, I was going to change right then, just withdraw my plea immediately, so Mr. Boyd walked over to where I was, said "Don't worry about the two years, I told you I would take care of it, you go ahead and take the sentence, when you get back into Georgia, I will guarantee you that two years will be remitted as soon as you are brought into Georgia. Then my brother walked over to where I was standing, we discussed it, and I said, What do you think. He said, I think Bill Boyd will do exactly what he says he will. I said I believe he will, he would not have come this far, he wouldn't back up. So Mr. Frank, he still insisted I should withdraw my plea right now, he said he would not take it, he would not take anybody's commitment until he had it in writing and he would not go on a man's word. I said I believe when a man went to considerable trouble, considerable expense, I just believe he will do what he says he will do. So I finally agreed. I said—he said, if you believe it, it is you, you go ahead, you're the man that's taking the chance. I said I believe that I will. So Mr. Boyd told me, don't worry about it, I will go right on and do it, as soon as the hearing is over with, I will inform the Federal Bureau that you have received a sentence and when you get into Georgia we will get this straightened out. That is about the whole thing that happened down there in court that day." The evidence continued that petitioner was not sent back to State custody within fifteen days but completed several years of federal time first, and the two years referred to by Mr. Boyd were not remitted.

After the additional years came into the picture, according to the testimony of Aubrie Joe Allen, Mr. Boyd said (R153-154) A. "Not to worry about the two years, that he would guarantee us that it would be remitted."

Based on the aforesaid inducements, assurances and promises from the said Solicitor General, petitioner did not withdraw his pleas and was sentenced by the aforesaid Judge to serve five to five years on all indictments and counts other than Indictment No. 83334, all these five to five year sentences to run concurrently, and on Indictment No. 83334, petitioner was sentenced to five to five years, to serve two years with balance suspended to follow the other concurrent five to five year sentences. (R14) On August 5th 1967, petitioner completed the service of the five to five year concurrent sentences.

On September 19th 1967, petitioner filed his Motion To Withdraw Plea And To Vacate And Set Aside Judgment of Conviction and Sentence with exhibits, (R15-42) response thereto with exhibits was filed by the Office of the Solicitor General, Atlanta Judicial Circuit. (R43-50)

On October 5th 1967, Evidentiary Hearing was held in Fulton Superior Court, where testimony and exhibits were introduced in behalf of petitioner and the State, (R63-176) and on October 6th 1967, said Motion was overruled. (R51) On October 6th 1967, petitioner filed Motion For New Trial and Rehearing (R52), and after the hearing date was duly continued, on March 21st 1968, said Motion was overruled, (R56) an appeal bond in the amount of $2,000.00 was set and made. (R53)

An appeal was taken to the Court of Appeals of Georgia setting out two enumeration of errors, each

alleging violation of due process of law constitutional rights.

The Court of Appeals of Georgia, on September 3rd 1968, affirmed the trial court, denying relief to petitioner. On September 18th 1968, Motion For Rehearing on the same ground was denied by the Court of Appeals of Georgia.

Petition for Writ of Certiorari tc the Court of Appeals of Georgia was filed in the Supreme Court of Georgia in regard to whether or not petitioner's plea of guilty was voluntarily entered without being induced by another, by the slightest hope of benefit or remotest fear of injury, and whether or not petitioner's constitutional rights were violated in the denial of petitioner's Motion to Withdraw His Plea of Guilt, same being denied on November 7th 1968. (R197) Motion For Reconsideration was denied on November 21st 1968, both motions being without opinion. (Appendix)

MANNER OF RAISING FEDERAL QUESTIONS

In Ground One and Two of petitioner's Enumeration of Errors to the Court of Appeals of Georgia, and by written Motion in the trial court, petitioner presented the question as to whether or not petitioner's plea of guilt was voluntarily entered, without being induced by another, by the slightest hope of benefit or remotest fear of injury, and whether or not petitioner's constitutional rights of due process of law were violated thereby and in not granting petitioner's Motion To Withdraw his plea of guilt. These points were also insisted on in the Petition For Writ of Certiorari to the Court of Appeals of Georgia filed in the Supreme Court of Georgia, and the Motion For Reconsideration thereof.

SUMMARY OF REASONS FOR ALLOWANCE OF WRIT

It is respectfully submitted and strongly urged that grave and important issues concerning the law of confession of guilt are involved in that the Court of Appeals of Georgia ruled that the petitioner in entering his plea of guilt was not misled by reasonable expectation of hope, since his attorney was present and the motion was not timely made, it being respectfully submitted that the evidence discloses that the late Solicitor General of Atlanta Judicial Circuit made various inducements and promises to petitioner, which were participated in and heard by petitioner's attorney and others, petitioner's undisputed exhibit (R175) and (Appendix) corroborating same, and that important constitutional questions are involved concerning the confession of guilt and denial of the right to withdraw said plea. It is respectfully submitted that the ruling under the facts in this case is not consistent with the present federal law concerning confession of guilt, and due process of law, important constitutional questions being involved herein.

ARGUMENT OF REASONS FOR ALLOWANCE OF WRIT

It is respectfully submitted and very strongly urged that the Court of Appeals of Georgia erred in denying petitioner relief in connection with whether or not petitioner's plea of guilt was voluntarily entered, without being induced by another, by the slightest hope of benefit or remotest fear of injury, and whether or not petitioner's Constitutional rights were violated thereby and in not granting petitioner's Motion to withdraw

his plea of guilt. Under the testimony of Attorney Frank S. French (R83-101, 110), petitioner's exhibit one in the lower court (R175) and (Appendix), testimony of J. Robert Sparks (R112-118, 127, 128), petitioner, Ambry D. Allen, Jr., (R129-144, 146), Juanita S. Cousey (R147-148), and Aubrie Joe Allen (R149-155), it is respectfully submitted that hope of benefit was certainly held out to petitioner by another.

Georgia Code Section 38-411 is as follows:

> "Confessions must be voluntary.—To make a confession admissible, it must have been made voluntarily, without being induced by another, by the slightest hope of benefit or remotest fear of injury."

Being *induced by others* by hope or fear is what renders an alleged plea of Guilty or confession of no probative value. See *Griffin v. State*, 12 Ga. App. 615, 617; *Foster v. State*, 22 Ga. App. 109 (2); *King v. State*, 91 Ga. App. 388; *Welch v. State*, 63 Ga. App. 277; *Strickland v. State*, 199 Ga. 792; *Smith v. State*, 64 Ga. App. 312; *Fortson v. State*, 96 Ga. App. 350.

It is well settled that a conviction, whether in a State or Federal Court, which is based upon an involuntary or coerced plea of Guilty, whether it be unfairly obtained or given through ignorance, fear, or inadvertence, is invalid as inconsistent with due process of law. See *Busby v. Holman*, 5th Cir., 1966; 356 Fed. 2d 75; *Waley v. Johnston*, 1942, 316 U.S. 101; 62 S.Ct. 964; 86 L.Ed 1302; *U. S. v. Tateo*, D.C. N.Y. 1963; 214 F. Supp. 560; 565; *Kercheval v. U. S.*, 1927, 274 U.S. 220, 223, 47 S.Ct. 852, 71 L.Ed 1009; *Machibroda v. U. S.*, 1962, 368 U.S. 487, 493, 82 S.Ct. 510, 7 L.Ed 2d 473;

Comm. of Penna. ex rel Herman v. Clandy, 1956, 350 U.S. 116, 76 S.Ct., 223, 100 L.Ed 126; *Wright v. Dickson*, 9th Cir. 1964, 336 Fed 2d 878; *U. S. ex rel McGrath v. La Vallee*, 2nd Cir. 1963, 319 F.2d 308; *Shelton v. U. S.*, 7th Cir., 1961, 292 F.2d 346; *Shelton v. U. S.*, 356 U.S. 26, 2 L.Ed 2d 579, 78 S.Ct. 563; *Murphy v. Wainwright*, 5th Cir. 1967, 372 F.2d 942; *Broxson v. Wainwright*, 5th Cir. 1967, 372 F.2d 944; *Weir v. U. S.*, 5th Cir. 1966, 363 F.2d 29.

One convicted of crime, upon his plea of Guilty, is deprived of a Constitutional right if he was deceived or coerced by the prosecutor into entering a plea of Guilty. *Walker v. Johnston*, 312 U.S. 275 (4); Also see *Mooney v. Holohan*, 294 U.S. 103, 79 L.Ed 791, 55 S.Ct. 340.

It is respectfully submitted that under the undisputed evidence in this case, there were three inducements, promises and commitments made to petitioner by the late Solicitor General, William T. Boyd:

1. That petitioner, after entering pleas of guilty and sentence, would be transferred from federal custody to State custody in not more than fifteen (15) days.

2. That petitioner would receive a total sentence of five (5) years to serve.

3. That the extra two-year sentence to serve proposed and handed down by the Judge would be taken care of and remitted.

It is respectfully pointed out that none of the federal decisions cited by petitioner in his Brief hinged their finding on the timeliness of the Motion To Vacate or withdraw plea, these cases making it crystal-clear that

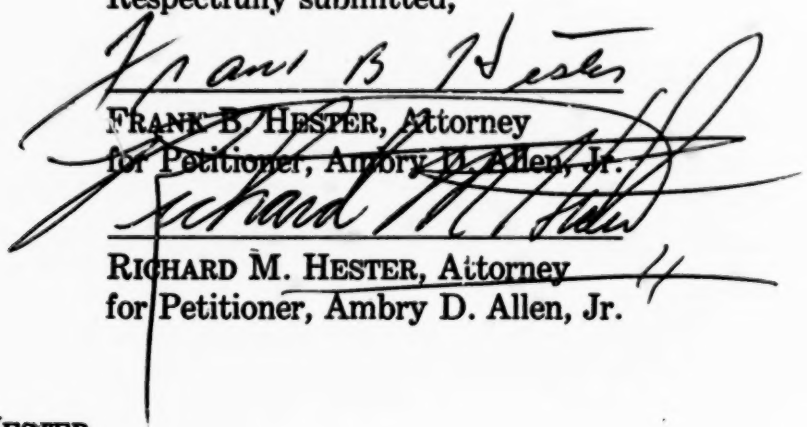
constitutional rights are involved. It should be noted that the United States Supreme Court held that, "a valuable right is never presumed to be waived." (*Johnson v. Zerbst*, 304 U.S. 458 (1937).) It would appear that the Honorable Court of Appeals of Georgia has taken the position that a defendant cannot be induced by another, by the slightest hope of benefit or the remotest fear of injury if the defendant has an attorney. See *United States v. Tateo*, 214 F.Supp. 560. It is urged that the psychological factors and elements which may be reasonably calculated and understood to influence the mind of petitioner were, the late Solicitor General involved made a personal visit to petitioner in Buncombe County Jail in North Carolina along with others, including petitioner's North Carolina Attorney. They discussed the federal sentence involved there, the possibility of withdrawing the federal plea there, said Solicitor indicating that if petitioner cooperated with him, such cooperation might make said Solicitor, Attorney General for the State of Georgia. Petitioner was contacted at the U.S. Penitentiary, Atlanta, Georgia by the then Warden or member of U. S. Bureau of Prisons, Fred Wilkinson, concerning a deal with the late Solicitor General, petitioner was produced on August 5th 1964 in Fulton Superior Court by habeas corpus ad prosequendum initiated by the office of the Solicitor General, Atlanta Judicial Circuit, said Solicitor indicated urgency of entering the plea before Honorable Stonewall Dyer on August 5th 1964, said Solicitor suggested the attorney which petitioner should employ for the plea, said Solicitor promised petitioner and his attorney that after entering the pleas of guilty and sentence, petitioner would be transferred from federal custody to State custody in not more than fifteen days,

arrangements having been made through the late Robert F. Kennedy, the then Attorney General of the United States, that petitioner would receive a total sentence of five years to serve, that the extra two-year sentence to serve handed down by the Judge would be taken care of and remitted. What reasonable inferences can be drawn from all the surrounding facts and circumstances involved under the evidence in this case? Can it be said that under the evidence in this case the petitioner was not induced by another to enter the plea with hope of benefit and that the presence of an attorney made everything right?

CONCLUSION

It is respectfully submitted that the decision and judgment of the Court of Appeals of Georgia in not affording petitioner the right to withdraw his plea of guilt under the facts in this case is contrary to due process of law and the constitutional rights thereunder, and the judgment of the Court of Appeals of Georgia should be vacated, the petitioner granted the right to withdraw his plea under Fulton Superior Court Indictment No. 83334, and the case remanded to that Court for further proceedings in compliance therewith.

Respectfully submitted,



FRANK B. HESTER, Attorney
for Petitioner, Ambry D. Allen, Jr.

RICHARD M. HESTER, Attorney
for Petitioner, Ambry D. Allen, Jr.

HESTER & HESTER
803 Fulton Federal Building
Atlanta, Georgia 30303
404-525-7616

APPENDIX

In the Court of Appeals of Georgia (118 Ga. App. 354); (163 SE2d 839)

43749. A. D. ALLEN, JR. v. THE STATE H–58 HALL, Judge.

An indictment was returned against the defendant in February 1963 for larceny of an automobile, alleging two previous felony convictions in 1951. The indictment was one of several to which the defendant pleaded guilty and was sentenced at the same time in August 1964. On the other indictments the defendant received 5-year sentences to be served concurrently. On this indictment he was sentenced 5 years with 3 years suspended and 2 years to be served following the concurrent 5-year sentences. In September 1967 the defendant filed his motion to withdraw his plea and set aside the sentence on this indictment. The trial court overruled this motion, and the defendant appeals.

The ground upon which the defendant contends he is entitled to relief from this sentence is in substance as follows: The defendant pleaded guilty to all the indictments, allegedly induced by the Solicitor's promise that he would receive sentences to be served for a total of five years. At the trial the court made known and the defendant's attorney informed him what the court's sentence on this indictment would be and that it would make the total time to be served seven years. Then, before the court sentenced the defendant, the Solicitor promised him that he, the Solicitor, would have the two years remitted, and upon this promise the defendant signed the plea of guilty on this indictment rather than withdrawing it.

It appears that the ground of this motion was previ-

ously raised by the defendant in a plea of habeas corpus and decided adversely to him. Allen v. Caldwell, 224 Ga. 47 (159 SE2d 289). Furthermore, while a defendant may move to withdraw a plea of guilty after sentence, he must do so promptly as was done in Griffin v. State, 12 Ga. App. 615, 617 (77 SE 1080). It should be remembered that the reason for allowing a defendant to set aside a conviction on a plea of guilty which was induced by hope for leniency offered by public officials, is not primarily to afford the defendant an opportunity to change his mind because the inducement or promises are not fulfilled, but to give effect to the law that only confessions understandingly and voluntarily made have probative value, and not those coercively induced by prosecuting officers in violation of law. See Griffin v. State, supra 622, 624; Welch v. State, 63 Ga. App. 277, 280 (11 SE 42); Smith v. State, 64 Ga. App. 312, 313 (13 SE2d 96).

The record and the argument of the defendant's counsel itself shows that the defendant was represented at the sentencing by competent privately obtained counsel who clearly explained to him that he would be sentenced to serve seven years instead of the five allegedly promised. The defendant argues that because of the assurance of the Solicitor that he, the Solicitor, would have two years of the sentence remitted he did not follow the advice of his attorney to withdraw his plea of guilty, and thereby he was denied effective assistance of his counsel.

The record abundantly shows that the defendant was intelligent and the foregoing facts show that he knowingly and intelligently and by his own affirmative decision and act rejected the advice of his counsel who

insisted that he should withdraw his plea at that time. By his action the defendant waived his right to trial on the issue of his guilt. This refutes his contention that he was deprived of his counsel's assistance and misled by a reasonable expectation of hope. King v. State, 91 Ga. App. 388, 390 (85 SE 637). See also Calloway v. State, 115 Ga. App. 158, 162 (154 SE2d 291).

Judgment affirmed. Bell, P. J., and Quillian, J., concur.

24934. SUPREME COURT OF GEORGIA

Atlanta, November 7, 1968

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

AMBRY D. ALLEN, JR. v. THE STATE

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be here denied. All the Justices concur.

24934. SUPREME COURT OF GEORGIA

Atlanta, November 21, 1968

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

AMBRY D. ALLEN, JR. v. THE STATE

Upon consideration of the motion for a reconsideration filed in this case, it is ordered that it be hereby denied.

FULTON COUNTY
Atlanta, Georgia

WILLIAM T. BOYD
Solicitor General, Atlanta Judicial Circuit
Third Floor Courthouse 30303
Phone JAckson 2-5310, ext. 271

August 5, 1964

Honorable James V. Bennett
Director
Bureau of Prisons
Department of Justice
Washington 25, D. C.

Re: AMBRY D. ALLEN, JR.

Dear Mr. Bennett:

The above named inmate of the U. S. Penitentiary in Atlanta, Georgia is currently serving a federal sentence of three (3) years. You will recall that I talked with you and Deputy Director Fred T. Wilkinson about this case earlier this summer while I was in Washington. The defendant was produced in Fulton Superior Court today pursuant to a writ of habeas corpus ad prosequendum. He entered pleas of guilty to all cases pending against him in Fulton Superior Court involving stolen automobiles and was sentenced by Judge Stonewall Dyer for not less than seven (7) years and not more than seven (7) years. He was then returned to the U. S. Penitentiary in Atlanta.

Pursuant to my conversation with you and Deputy Director Wilkinson, I now request that you designate

the Georgia State Board of Corrections as the place of confinement for the completion of Mr. Allen's federal sentence, and authorize the Warden to release him to State authorities to commence serving his State sentence.

Very truly yours,

/s/ Wm. T. Boyd
WILLIAM T. BOYD
Solicitor General

WTB:js
cc: Hon. Fred T. Wilkinson

CERTIFICATE OF SERVICE

I do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and have this day delivered three (3) copies of this Petition For Writ Of Certiorari to the Court of Appeals of Georgia by personally handing same to Honorable Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, Fulton County Courthouse, Atlanta, Georgia 30303.

This 4th day of February, 1969.

Frank B Hester

FRANK B. HESTER, Attorney
for Petitioner, Ambry D. Allen, Jr.

HESTER & HESTER
803 Fulton Federal Building
Atlanta, Georgia 30303
404-525-7616